United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2221

(41803)

To be argued by
SUSAN S. BELKIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/S

CHARLES DEFELICE, a minor under the age of 21 years, by his mother GERTRUDE DEFELICE, PETER A. DUNN, a minor under the age of 21 years, by his mother, ELLEN DUNN, YVETTE HARRISON, a minor under the age of 21 years, by her mother, SUSIE HARRISON, GEORGE IRISH, JR., a minor under the age of 21 years, by his father, GEORGE J. IRISH, VILMA MORAN, a minor under the age of 21 years, by her father, PEDRO MORAN, ALFREDO A. RAMOS, a minor under the age of 21 years, by his mother ALFRIDA RAMOS, on behalf of each and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, MURRAY BERGTRAUM, President of the Board of Education of the City of New York, HARVEY B. SCRIBNER, Chancellor of the Schools of the City of New York, IRVING ANKER, Superintendent of Schools of the City of New York, JACOB ZACK, Assistant Superintendent in Charge of High Schools of the City of New York, and HILLERY C. THORNE, Director of Central Zoning of the Board of Education of the City of New York,

Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-2221

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APPELLANTS' BRIEF

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Dooling, *J.*), entered August 8, 1974, which found that the zoning of Franklin K. Lane High School, located in Brooklyn, New York, constituted unconstitutional segregation and ordered rezoning and reassigning of students at the various public high schools in the Franklin K. Lane High School area.

Issue Presented

The District Court found that the zoning by the Board of Education of the City of New York of the Franklin K. Lane High School district constituted *de jure* segregation. After holding hearings on proposed plans to change the zoning of this school, the District Court ordered that the "defendants implement the Board of Education of the City of New York Franklin K. Lane Zone Proposal including Implementation Plan A, . . . as submitted July 15, 1974, pursuant to the Order of May 16, 1974, with the modification that no new students are to be admitted to Franklin K. Lane High School from the 'Areas Removed from Franklin K. Lane H.S.' in the school year commencing September 1974 and the students from such areas will be assigned in accordance with the scheme set forth at page 9 of the Proposal among the schools there listed."

The sole issue presented for review on this appeal is whether the District Court was correct in holding that Franklin K. Lane High School is an unconstitutionally and/or illegally segregated school. The appellants do not challenge the appropriateness of the District Court's remedy, if its holding on the issue of liability was correct.

FACTS

Chronology of the Litigation

(1)

This civil action for injunctive relief and a declaratory judgment pursuant to Title 42 U.S.C. §1983 and Title 28 U.S.C. §2201, was brought on behalf of a number of students enrolled in Franklin K. Lane High School by parents of such students. It was brought as a class action, sued on behalf of all others similarly situated for an adjudication that their school had been so zoned as to make and keep it a segregated school in spite of its location (11a, 72a).*

In the complaint, dated May 3, 1971, it is alleged that the New York City Board of Education has created *de jure* segregation in the Franklin K. Lane High School district, in that the defendants-appellants "failed in their affirmative duty to alter zone lines and draw new lines through counties and county tiers to facilitate the rapid establishment of an integrated school system and more particularly, the Lane High School district" (13a-14a). It is also alleged that, as a result of the *de jure* segregation of the "Lane High School district, educational services necessary for the servicing of Lane are insufficient resulting in detriment to the health and education of plaintiffs" (14a).

Plaintiff-appellees do not allege that students at Lane receive fewer services than students at other similarly situated high schools in New York City. Plaintiffs-appellees in their complaint requested that the then zoning of Lane district be declared void (15a).

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* Unless otherwise indicated numbers in parentheses refer to pages in Appellants' Appendix. The numbers followed by (a) refer to pages at the beginning of Appellants' Appendix Volume I. The numbers not followed by (a) begin after page 78a of Volume I and continue through Volume IV of Appellants' Appendix.

By order to show cause, also dated May 3, 1971, plaintiffs-appellees moved for a preliminary injunction to enjoin further enforcement of the zoning of Franklin K. Lane High School and to compel rezoning under Court supervision (16a). On June 21, 1971, the defendant-appellants moved for summary judgment (12a). Judge Dooling denied both the plaintiffs-appellees' motion for a preliminary injunction *pendente lite* and the defendants-appellants' motion for summary judgment in a Memorandum and Order dated April 10, 1972 (72a-78a).*

(2)

On May 5, 1972, a hearing was held before Judge Dooling, after which a conference was held to determine the issues to be tried (1-58). A trial on the question of the liability was conducted on December 13-15, 1972, and December 18-19, 1972. (59-805).

In a Memorandum and Order, dated May 16, 1974, Judge Dooling found that the data presented at trial showed that from 1961-1972, no change was made in the Franklin K. Lane school district on the eastern, or Queens border (907). Changes were made in the western border by eliminating from the Lane school district certain areas at the western extremity of the district (907). Based upon his assessment of the evidence, Judge Dooling held that the "advertent" action of the Board of Education over the years "has countenanced and sought to compensate for a known and intensifying racial and ethnic imbalance in Lane, but has failed to accord the school districting that can be justified by any standard relevant to educational

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* Judge Dooling stated his basis for finding the Board of Education liable of creating a *de jure* segregated school district, in this Memorandum decision. Since this is discussed in the section of this Brief called "Opinions Below", *infra* pp. 19-20, it will not be discussed at this time.

or neighborhood or geographical considerations or to overriding community interests or to continuity in education." (928-929). Judge Dooling ordered the redistricting of Franklin K. Lane High School (929-932).

(3)

The Board of Education conducted two public meetings on May 24, 1974 and May 31, 1974, on the redrafting of the borders of the Franklin K. Lane School zone. At the second of the meetings a rezoning proposal in tentative draft form was presented and distributed by the Board (930).

On June 21, 1974, Judge Dooling ruled that more time was needed to determine whether the tentative proposal could be adopted, and that a hearing on the final proposals of the parties had to be held "on notice that affords an opportunity for responsible public expression of views" (930-932).

A hearing was held on August 2, 1974, and August 5, 1974. During the entire period after the May 16, 1974 order, through the date of the hearings, letters from individuals, parents' associations, parent-teacher associations, and civic and neighborhood groups were received in District Court, as well as petitions bearing a very large number of signatures. (933-1249).*

On August 8, 1974, Judge Dooling ordered (1250-1251):

> "1. That defendants implement the Board of Education of the City of New York Franklin K. Lane Zone Proposal Including Implementation Plan A . . . as submitted July 15, 1974 pursuant to the Order of

* Since the defendants-appellants are not appealing, the remedy part of the judgment, we will make only brief references to the hearings conducted in the District Court and the communications received by the District Court on this issue.

May 16, 1974, with the modification that no new students are to be admitted to Franklin K. Lane High School from the 'Areas Removed from Franklin K. Lane H.S.' in the school year commencing September 1974 and the students from such areas will be assigned in accordance with the scheme set forth at page 9 of the Proposal among the schools there listed.

2. That jurisdiction of this suit is retained for the purpose of making any further orders to carry into effect this judgment and any further order necessary or proper to be made."

Evidence

The evidence presented in the exhibits attached to the defendants-appellants' motion for summary judgment, by the testimony at the trial, in all the exhibits admitted into evidence at the trial and in Judge Dooling's summaries of the facts in the three memorandum decisions is for the most part not disputed.*

(1)

Franklin K. Lane High School, an academic, coeducational high school with a population of approximately 4800 students, is located on the boundary between Brooklyn and Queens at Jamaica Avenue and Elderts Lane (12). This area is known as Cypress Hills and is a predominantly white neighborhood (13).

Franklin K. Lane High School was built in 1937 (Defendant's Exhibit A p. 66, 572). At that time the attendance zone of Lane was drawn, encompassing parts of

* In large measure, the following statement of the evidence adduced below follows and is taken from Judge Dooling's Memorandum and Order dated May 16, 1974.

Brooklyn and Queens (573). This zone was asymmetrical in shape, taking into consideration the location of pre-existing nearby high schools, *i.e.*, Richmond Hill, Grover Cleveland, Bushwick, Boys High and Thomas Jefferson (572-573). The area immediately north of Lane was and is composed of non-residential property, cemeteries and parkland (29a, 822-839).

The Lane zone never had "school house centricity" (76a, 573). A "neighborhood zone", in the sense of a zone which extends outward from the school along routes of convenient access in geographical coherence around the school was not, and is not present (76a, 573). The shape of the attendance zone for Lane, drawn in 1937 is similar to the attendance zone for Lane in 1961 (266-267, 313, 529-533).

In 1961, the attendance zone for Lane was approximately as follows: "Beginning at Spring Creek Park, along the Eastern Edge of the Park to 157th Avenue, to Elderts Lane; to 97th Avenue; to Woodhaven Boulevard, to Park Lane South; to the Long Island Railroad; to Myrtle Avenue along Forest Park and the Cemeteries to Evergreen Avenue; to Putnam Avenue; to Bushwick Avenue, to Gates Avenue; to Summer Avenue; to Fulton Street, to Utica Avenue; to St. Marks Avenue; to Liberty Avenue to Barbey Street; to Belmont Avenue; to Shepherd Avenue; to Dumont Avenue; to Atkins Avenue; to Spring Creek Park" (36a; see also 529-532, 822-823).

(a)

Changes in the ethnic population of Franklin K. Lane High School

For many years the ethnic distribution of pupils at Lane was predominantly white (or "other" as described in Board of Education statistics) (34a, 907). As late as 1961, the population of Lane was 23.1% black, 4.1%

Puerto Rican and 72½% "other" (34a, 907). Commencing in 1965 the black population of the school rose steadily, from 39.8% in 1965 to 44.8% in 1966, 47% in 1967, 50.1% in 1968, 53.5% in 1969, 56.2% in 1970, 57.2% in 1971, 59.6% in 1972, and 61.2% in 1973. In addition, the Puerto Rican population of the school likewise increased from 4.1% in 1961 to 20.8% in 1973. Meanwhile, the "other" population of the school declined steadily from 72.8% in 1961 to 16.2% in 1973 (35a, 908).

The ethnic composition of the Franklin K. Lane student body reflects essentially the ethnic patterns of two district geographic areas from which Lane draws its students. The eastern portion of the Lane attendance zone, located primarily in Queens, is still predominantly composed of "other" population, while the western end of the Lane zone, encompassing parts of Bedford-Stuyvesant and Ocean Hill Brownsville, has become increasingly black and Puerto Rican (554-555).

(b)

Changes in the attendance zone of Franklin K. Lane High School

From 1937 through 1973, there were no substantial changes in the zoning of Franklin K. Lane as it juts into Queens at the eastern end of the zone (313, 531-542, 822-839). One minor change, involving the Forest Park Coop, which involved about 13 white children, was made in the eastern boundary (541).

Some changes were made in the western part of the zone of Lane during this period (542). "Skip zoning" or rezoning, in which a school zone is made up of two or more noncontiguous zones was used in parts of the Lane zone. In the 1967-1970 school year some enclaves or "skip" zone were carved out of the western part of the Franklin

K. Lane area (543, 840-844). Children from these various enclaves who were predominately black and Puerto Rican students were sent to other Brooklyn High Schools with over 70% "other" populations, *i.e.*, Midwood, Franklin Roosevelt, Tilden and Sheepshead Bay (543, 840-844).

In the school year 1970-71, the western boundary of the Franklin K. Lane zone was cut back in the creation of a zone for Boys High School, which had previously been unzoned, and certain other areas at the western end of the Lane zone were rezoned to other schools (545, 706-707, 840-844). In addition, a number of "skip zones" or enclaves located within the Lane district were placed in the Boys High School district (545, 706-707, 840-844). In 1971-72 students in two feeder schools for Franklin K. Lane, in the Ocean Hill-Brownsville area, I.S. 271 and I.S. 55 (schools composed primarily of minority students) were given open options to go to other schools in south Brooklyn (44a, 332-334, 545, 707, 840-844).

Anther change in the Lane zone was the result of violent eruptions at the school in 1968 (32a). At that time Franklin K. Lane was operating at 125 percent of capacity, causing it to be placed on overlapping sessions (32a, 378). Subsequently, the student population was reduced by approximately 1000 students (32a, 915). This lowered the plant utilization of the school to approximately 100 per cent and allowed the school to return to single session (32a). In 1973, Lane had a capacity rated at 4426 students and was 111% utilized (915).

The zoning policies adopted by the Board of Education in the Franklin K. Lane zoning district in effect eliminated some of the influx of minority students into this school, caused by the change in the residential pattern of some parts of Brooklyn (707). The zoning changes did not eliminate any of the original Queens sections of the Franklin

K. Lane, which have remained predominately "white" areas (707).

For zoning purposes, Franklin K. Lane High School has always been considered to be both a Queens and Brooklyn High School (184). Borough lines are not sacrosanct on the high school level although they are used in zoning on the elementary and junior high school levels (208, 211). For administrative purposes Franklin K. Lane was once under the supervision of the Queens High School Superintendent and is now under the Brooklyn High School Superintendent (210, 261, 312).

(2)

The statistics on the population of Lane are not totally descriptive of the situation, since the history of its population change is reflective of the total population change in the academic high schools of Brooklyn and of the population changes in the schools reasonably near Lane in Brooklyn and Queens (351, 599, 891-893, 908).

In the period from 1957 through 1971, the "other" population in all academic high schools in the entire city of New York declined from 86.1% to 53.3% (891-893, 908). The black population of the schools has in the same period increased from 9.3% to 31.0% and the Puerto Rican population in the schools has increased from 4.6% to 15.7% (891-893, 908). In Brooklyn in the period between 1961 and 1971, taking academic and vocational high schools together, the "other" population has declined from 82.1% to 48.9%, the black population has increased from 12.1% to 34.7% and the Puerto Rican population increased from 5.8% to 16.4% (894-895, 908). In all of the Brooklyn academic high schools taken together in the period 1957 through 1972, the "other" population declined from 90.2% to 50.1% (896-898, 902-903, black population has increased from 12.1% to 34.7% and

908). The decline in "other" population is a steady decline without reversal in trend between any two years.

During the same period, 1957 through 1972, the black population in all Brooklyn academic high schools taken together increased from 7.4% to 36.5%. Again, the increase in black population is a steady increase from year to year without reversal in trend and the higher year-to-year rates of increase are in the years in the latter part of the period (896-898, 902-903, 909).

Over the same period, 1957 to 1972, the Puerto Rican population in all Brooklyn academic high schools combined has increased from 2.4% to 13.4%, and the increase is without change in trend at any time except between the years 1959 and 1960 when there was a small diminution in Puerto Rican percentages which was reversed in the following year (896-898, 902-903, 909).

The figures with respect to the academic high schools in Queens present the same trend but with a somewhat different degree of progression. The percentage of "other" students in the academic high schools of Queens combined declined from 94.2% in 1957 to 69.3% in 1972. The decline in the "other" population of the Queens schools, as in the case of Brooklyn, is steady and unreversed in any year, and the percentages of annual decline tend to be somewhat higher in the later years than in the earlier ones. Over the same period of time, 1957 to 1972, the black population in all Queens high schools combined increased from 5.1% to 26.1% and the Puerto Rican population from 0.7% to 4.6% (899-901, 909).

Judge Dooling in his Memorandum and Order of May 16, 1974, stated (909-910):

> "The population trend in the Lane High School is, thus, embedded in a picture of total change both in

the city as a whole and within the boroughs of Brooklyn and Queens, and particularly in relation to the academic high schools in each of the boroughs. But the problem is not one of uniform distribution in space, of course, but is one made up of a set of trends and conditions. Very broadly, the concentrations of black and Puerto Rican population in the borough of Brooklyn tend to be in the northerly part of the borough and the concentrations of black and Puerto Rican population in Queens tend to be in the southerly part of that borough. Both boroughs are large from the point of view of daily travel to and from points located at or near opposite ends of each borough and from points well within one borough to points well within the other, and public transportation is not patterned to fit the requirements of school population attendance and transfers."

With respect to the areas near Franklin K. Lane, Judge Dooling noted (914-915):

"The school districts contiguous with that of Lane in Brooklyn are Bushwick, Boys and Jefferson. Canarsie, South Shore, Tilden and Wingate High Schools have districts, portions of which are not more distant from the Lane district than are the remoter parts of the Bushwick and Jefferson districts. Of the Brooklyn schools with contiguous districts, Bushwick is 17% "other", 47% Puerto Rican and 36% black. Thomas Jefferson has 5.1% "other", 27.7% Puerto Rican and 61.2% black, and Boys High School, the third contiguous territory school has 1.8% "other", 7.9% Puerto Rican and 90.3% black. The schools next farther removed are Canarsie and Wingate. Canarsie has 61.8% "other", 7.8% Puerto Rican and 30.4% black, and Wingate has 6% "other", 9.1% Puerto Rican and 84.9%

black. The next more remote schools to the southwest are South Shore and Tilden. South Shore is 65.5% "other", 4.3% Puerto Rican and 30.2% black, and Tilden is 59.6% "other", 5.3% Puerto Rican and 35.1% black. Still farther away, Erasmus has 35.9% "other", 6.7% Puerto Rican and 57.4% black and Midwood has 71.3% "other", 2.6% Puerto Rican and 26.1% black.

The schools which have districts either primarily or wholly in Queens that are contiguous to the Franklin K. Lane district are Grover Cleveland which lies, in the main, north and north of the westerly end of the Lane district, Richmond Hill, which lies in the main east of Franklin K. Lane, and John Adams, which lies to the south and southeast of Lane district. The 1972 school year population at Grover Cleveland is 85.3% "other", 4½% Puerto Rican and 9% black. (At an earlier period when it had substantial enclave students from skip zone territory in Brooklyn, Grover Cleveland had had, in the 1967 and 1968 school years, 31% black and in 1969 23½% black and in 1970 14.1% black.) Richmond Hill High School is 62.8% "other", 8% Puerto Rican and 29.2% black. John Adams High School is 74.2% "other", 5.5% Puerto Rican and 20.3% black. Grover Cleveland and Richmond Hill are roughly the same size, about 3000 students in capacity terms, and John Adams has a capacity of 4,133; Grover Cleveland is 138.8% utilized in the current year, John Adams, 124.8% utilized, and Richmond Hill 118.0% utilized. Lane has a capacity rated at 4426 and is 111% utilized."

(3)

Although the extent of school integration in the City of New York is somewhat limited by extensive residential segregation, it is the policy of the Board of Education to

try to improve the ethnic balance in its schools (23a, 556-568). The Board has utilized a number of methods in attempting to achieve ethnic balance in High Schools. The first of these is to rezone in such a way as to extend school districts to achieve whatever balance sheer geography can supply (911). A second expedient has been to establish detached or "skip" zones in neighborhoods which are considered ghetto neighborhoods for schools sometimes rather far distant. The ghetto students living in the "skip" zone are then able to attend schools in which their own racial or national stocks are a minority (561-562, 863-864, 911).

The skip zoning was perhaps at its height in the school year 1969-1970, when there were, in Brooklyn, skip zones not only for the Brooklyn schools in the southern part of the borough but also for Richmond Hill High School, in Queens. And, in the school year 1970-1971, both the Bryant Hill School in Queens and Richmond Hill High School had Brooklyn skip zones and South Shore High School in Brooklyn had a skip zone from a more northerly part of the borough of Brooklyn. In the 1972 school year, there were no skip zones as between school districts within Brooklyn but there remained in the northern part of Brooklyn skip zones for three of the Queens high schools, Bryant High School, Grover Cleveland High School and Richmond Hill High School (184, 561-562, 864, 911-912).

In addition to the skip zones, there was also an optional program under which students in junior high and intermediate schools who are ready to enter high school are offered the option to apply instead for admission to another high school outside their own high school zone (199-200, 556-557, 912). The program was offered to graduates of selected intermediate and junior high schools in the Erasmus High School zone, the Thomas Jefferson High School zone, the George Wingate High School zone, the Franklin

K. Lane High School zone, the Boys High School zone, and the Eastern District High School zone. Under this program, students were permitted to list their choices of certain other high schools, and to the extent of seating availability they could then be assigned to schools other than the ones into which they were zoned. The number involved in this program approximated 2,000 students (557, 912).

A third approach pursued by the Board is the locating of new schools (316). For example, the Hillcrest School was built fairly close to Jamaica High School and was zoned to extend well to the north and well to the south (273, 316, 912-913). Similarly, in Brooklyn, newer schools were located in the middle part of the borough, and no new schools were opened in the northerly part of the borough (317, 913). The purpose of this was to relieve imbalance by locating schools in areas in which the school populations would necessarily be drawn from neighborhoods having very different racial and ethnic compositions (566-569, 913).*

More recently, the tendency of the administration has been to build the schools where the students are and to rely on other means of coping with the problem of providing integrated education. Three new high schools are under construction in Brooklyn, including two in North Brooklyn (294-296, 564, 913). In part, this reflects recognition of the idea that the enormous size of the New York City school district, considered as a single consolidated school district, tends itself to defeat the zoning effort because of the great

* The integrating effect of such a siting policy, however, tends to dissipate during the period of delay between planning and actual opening of a school because population shifts occur during that interval. When the schools open they at times have a population mix already heavily tilted against the "other" group (913).

extent of the imbalanced neighborhoods and the relatively few neighborhoods that approach being integrated residentially (913). This fact, coupled with the emigration from the City of parents with school age children, creates a situation which the Board of Education is powerless to rectify by its own local action (308, 351-354, 913).

A number of experimental unzoned schools which offer special programs have been created by the Board of Education. It is hoped that they will operate to maintain a better population balance in the New York City High Schools by making family emigration less attractive and the transfer of school age children to other, non-public schools less desirable (312).

Another experiment attempted by the Board of Education in an effort to adjust the ethnic imbalance in schools is the reorganization of some of the High Schools into "comprehensive" schools, *e.g.*, August Martin and Clara Barton (317). A comprehensive program provides for business needs, vocational needs and academic needs. It accommodates students who are planning to go to college and professional schools as well as those who will be semi-skilled and skilled workers (319). Every student who lives in the area or lives in the optional zone may go to the school and the Board of Education attempts to provide a curriculum for them (319).

(4)

As Judge Dooling noted, the Board of Education, in addition to attempting to improve racial balance in the schools, has attempted to provide adequate educational opportunities appropriate to the nature and extent of the needs of the student body of the different high schools. Thus he noted that the emphasis of the evidence presented by the Board of Education in this case was on the educa-

tional significance of the school population rather than the abstraction of racial balance separated from a concern with the educational problems presented by the school (917-918).

Franklin K. Lane High School according to the data presented at trial has a student population with severe educational problems. The attendance percentage at the school is 58%, while for the City as a whole the attendance rate is 77%. Pupil "transiency" is 61½%, as against City wide transciency of 45.2%. In Lane, 49% of the pupils read two or more years below grade level; the corresponding percentage for the entire City is 29.6%. The numbers graduating and receiving diplomas is small in terms of the total school enrollment (Defendant's Exhibit A pp. 66-67, 918). The data presented at the trial led Judge Dooling to conclude that the "input to Franklin K. Lane is to a very considerable extent made up of children who are seriously handicapped from the educational point of view" (918).

The data presented at trial also showed that, to the extent that resources permit, Franklin K. Lane has received proportionately adequate allocations for dealing with its educational problems. In many instances, Lane received a larger share of such allocations, than other schools which were similarly situated (see, Defendant's Exhibit A, pp. 196-197). The data showed the guidance services and supplementary services, made available out of tax levy and reimbursable funds, through allocations which consider the educational problems that registrants at Lane present. The data showing the distribution of such funds are given in Exhibit A in Appendix D on pages 196-197 and in Appendix D at pages 202-204 (these two pages continue each other and page 203 should follow them).

Special programs in operation at Lane which are addressed to the educational handicaps of the student body

are several in number (922-923). One is the "College Bound" program, which is a reimbursable program and has some federal funding (923). It embraces an aggregate of about 300 students drawn from three different school years and is intended to give special assistance and a more intense educational experience to students of promise who nevertheless have some educational handicap. The program devotes double the usual amount of time to English, and the English class-sizes are limited to twenty students. Social Studies classes are set at fifteen to eighteen, mathematics and science classes at about fifteen (923).

A second program is "Towards Upward Mobility" which embraces some one hundred students. It is addressed to encouraging students to continue in school, and it establishes a tie between work in the outside world and in-school education (923).

A smaller group, some 20-25 students are in the STEP program (School to Employment Program). The program again attempts to integrate in-school education with real-life employment. Another 75 to 100 students are engaged in the Franklin K. Lane Urban Affairs Program which uses a modified curriculum and emphasizes the link between school work and employment with particular reference to public employment in city departments as well as in industry and commerce (923).

Another program, designed particularly for students who truant, utilizes a shorter school day, two teachers to a class, and a smaller class registration, together with a loose program of work-study, again oriented toward city work. The registration of this program is 1,000, but as a practical matter it deals with but 300 students at a time who, in effect, rotate through the program cyclically. There is a key teacher assigned for the entire day and a second teacher is

available for one period a day. There are eight groups of 130 each, and 16 teachers in the total program (924).*

Opinions Below

Judge Dooling issued three different opinions in which he discussed the basis of his finding of liability. In none of these did he find that the appellants had changed the zone of Franklin K. Lane High School in any manner which increased the ethnic imbalance in that school.

(1)

In a Memorandum and Order dated April 10, 1972, dismissing the motions for preliminary injunction and summary judgment Judge Dooling acknowledged that the Board of Education had "faced an ever more intractible housing pattern" by "ingenious rezoning", "skip" zoning and an "open admissions" program (75a). However, after finding that the ethnic unbalance was the consequence of the residential pattern, Judge Dooling said (76a-77a):

> "The consequence, with equal inevitability, however, is that the Board's school zoning is specifically advertent to the existence of racial and ethnic imbalances and to the dilution or deprivation of educational opportunity implicit in it, and in its zoning the Board deals insistently and directly with the ethnic composition of the schools; where segregation in an objectively invidious sense is the result, it is *de jure* segregation

* It should be noted that Judge Dooling in discussing these various special programs did express some reservations about them, initially on the ground that, whatever the merits of the particular special programs, the emphasis on such programs necessarily detracted from the resources available for the general academic program at Lane (925-926). As we read this portion of Judge Dooling's opinion, however, such criticism, if criticism it is, was not intended to serve as a basis for a finding of unconstitutional discrimination or segregation.

and is not an uncured consequence of housing patterns helplessly submitted to as beyond the reach of feasible compensatory planning . . . .

Here the Lane zone has no school-house centricity. A 'neighborhood zone', in the sense of a zone which extended outward from the school-house along routes of convenient access in geographical coherence around the school is not present. Lines drawn in that way to enclose a school district would radically change the ethnic distribution of the Lane school population. That is evident from the data on the populations of Grover Cleveland, Forest Hills, Richmond Hill and Jamaica High Schools, all of which are over 60% 'other', and from the 1970 census tract data on 'General Characteristics of the Population and Occupancy, Utilization and Financial Characteristics of Housing Units.' *Prima facie*, an objectively segregated school zone thus appears to have been established and adhered to in a series of zonings that has tended advertently to reinforce rather than to mitigate the educational disadvantage of an imbalanced school . . . Certainly an imbalanced school is not individiously segregated *per se* if its imbalance is a result of housing patterns only . . . but that appears to be not the present case. Here, an artificial and irrelevant factor appears to have intruded, the boundary between the boroughs, and to have exerted an unjustified influence on the zone planning."

This language was quoted by Judge Dooling in his final memorandum decision dated August 8, 1974 (1265-1266).

(2)

After trial, in a Memorandum Incorporating Findings of Fact and Order dated May 16, 1974, Judge Dooling

concluded that no substantial change had been made in the boundaries of Franklin K. Lane school district except that (907):

> "In the school year 1969-1970 three 'skip zones' were cut out of the Lane School district and students from the skip districts were assigned to Franklin Delano Roosevelt High School, Midwood High School and Tilden High School, all of which are in the more southerly and westerly parts of the borough of Brooklyn. A fourth skip zone, Sheepshead Bay High School, was also cut out of the Lane district and these students were sent to a school located far down in Brooklyn in the Sheepshead Bay area. In the school year 1970-1971, Boys High School, located in the north central part of the borough was for the first time zoned, and the zoning of Boys High School resulted in the assignment of a part of the western extremity of the Lane school district to the new Boys High School district."

Judge Dooling found that the ethnic imbalance in Franklin K. Lane was caused by the appellants.

He wrote in part (916):

> "While there must be unqualified recognition of the immense difficulty which the Board of Education faces in rezoning schools, the conclusion is compelled that the Lane school district does not as it presently exists reflect equality of treatment with the other school districts which are in its region. It manifests unexplained and unwarranted imbalance in circumstances in which the composition of the district implicitly reflects failures to act upon recognized principles elsewhere applied in school zoning in the city. Repeated adherence over a long period of time to the Lane boundaries, continuing after the pendency of the present action had sharply drawn the situation to the

attention of the Board, reinforces the conclusion that there must be a final order requiring the redistricting of Lane in such manner as substantially to redress the present imbalance."

Judge Dooling concluded that (928-929):

"The case is one in which the unmistakably advertent action of the Board over the years has countenanced and sought to compensate for a known and intensifying racial and ethnic imbalance in Lane, but has failed to accord the school districting that can be justified by any standard relevant to educational or neighborhood or geographical considerations or to overriding community interests or to continuity in education. There remains no justification for the skewed district and its direct effect in producing an imbalanced school population. While the Lane district extends into Queens, it remains a fair inference that an artificial and unwarranted effect has been produced by treating Lane as a Brooklyn school to be districted primarily in a pattern for Brooklyn schools rather than as part of the complete pattern of all the schools, without reference to borough lines or borough-oriented administrative organization. . . ."

(3)

In the Memorandum and Order for Judgment, dated August 9, 1974, Judge Dooling discussed the plans for redistricting Franklin K. Lane High School. However, he stated that the children in the area who would be assigned out of Lane, under the plan adopted by the District Court, are the children who have been unconstitutionally discriminated against (1265):

". . . because they have been zoned into a school which by the standards of the city wide school system

is a *de jure* segregated school district. Relief of the children from this area from invidious discrimination and relief of other students in the district similarly situated has been and remains the goal of the litigation. It is not correct to think of the case as seeking to achieve a better racial and ethnic balance in the school, and to define that in terms of the highest feasible percentage of 'other' population in the school. Redressing imbalance is a mathematical consequence of measures taken to eliminate invidious discrimination. Comparative imbalance between schools in the same city wide school district, for the same reason, discloses the existence of *de jure* segregation, of invidious discrimination."

ARGUMENT

The ethnic composition of the Franklin K. Lane High School District changed gradually over a ten year period due to changes in the housing patterns within the Lane District. The District Court applied an erroneous legal standard in determining that the failure of the Board of Education to change the long existing zoning of the Franklin K. Lane High School District constituted *de jure* segregation.

(1)

Franklin K. Lane High School in 1973, was a school which had a predominantly non-white ethnic population. The ethnic composition of Franklin K. Lane consisted of a black population of 61.2%, a Puerto Rican population of 20.8%, and an "other" or "white" population of 16.2% (35a, 907-908). The ethnic population of Franklin K. Lane was an amalgam essentially of the ethnic populations of two distinct geographic areas. The eastern area of the

Lane attendance zone, encompassing parts of Queens, was still predominately composed of "other" population, while the western end of the Lane zone, encompassing parts of Bedford-Stuyvesant and Ocean-Hill-Brownsville, had, in the last ten years, become increasingly black and Puerto Rican in ethnic composition (554-555).

From 1937 through 1973, there were no substantial changes in the zoning of the Franklin K. Lane High School district as it juts into Queens on the eastern border of the zone (313, 531-542, 822-839). Some changes were made in the western part of the zone of Lane during this period which decreased part of the Lane zone. See further, *supra* at p. 8-10. The areas eliminated by these zoning changes were primarily composed of students from black or Puerto Rican ethnic groups.

The population trend in Lane High School is embedded in a picture of total change both in the city as a whole, and within the boroughs of Brooklyn and Queens (909-910). The school districts contiguous with that of Lane in Brooklyn are Bushwick, Boys and Jefferson High Schools. These schools have ethnic populations that are similar in composition to the ethnic population of Franklin K. Lane in 1973. The schools which have districts either primarily or wholly in Queens that are contiguous to the Franklin K. Lane district are Grover Cleveland, Richmond Hill, and John Adams High Schools. The 1973 school year population at these schools was composed of over 60% "other" or "white" students (914-915).

Judge Dooling found, on the basis of these undisputed facts, that "repeated adherence over a long period of time to the Lane boundaries" constituted "unmistakably advertent action" by the Board of Education (928-929). He further held that the Franklin K. Lane High School dis-

trict was a *de jure* segregated school district. It is respectfully submitted that Judge Dooling applied an erroneous legal standard in determining that a constitutional violation had occurred.

(2)

The concept of *de jure* segregation in the context of school district desegregation cases was discussed in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954). In that case the Supreme Court held that state action which deprives a child of "equal educational opportunity" is violative of the Equal Protection Clause of the Fourteenth Amendment. In *Brown* the Supreme Court found that the Board of Education of Topeka, Kansas, had maintained a "dual school system," in that students were assigned to schools on the basis of their race in order to segregate them.

Since *Brown* there have been a number of cases which have discussed *de jure* segregation, both in the context of southern "dual" school systems and northern "unitary" school systems. However, the Supreme Court has not found that jurisdiction exists authorizing school desegregation orders absent a finding that the government is somehow responsible for the segregation. See generally, NOTE, *School Desegregation after Swann: A Theory of Government Responsibility*, 39 U. Chi. L. Rev. 421, 426 (1972).

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the concept of *de jure* segregation in school districts was expanded. That case, and the cases consolidated with it, arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. Within the context of that history, the Supreme Court stated

that attendance zones are not acceptable merely because they appear to be neutral, for such plans may fail to counteract the continuing effects of past school segregation. However, the Supreme Court further said (*Id.* at 28):

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes."

Certainly, in the Franklin K. Lane case, there is no history of a school system which used racial discrimination as a basis for drawing school district zoning. As stated in the *Swann* case, and in the cases cited below concerning neighborhood schools, *infra*, p. 31-32, mere racial inequality in composition of the student body of a school is not a basis for a finding of liability without some proof of state action and state intent which created this inequality.

In the recent Supreme Court and Circuit Court decisions, the concept of *de jure* segregation has been discussed and further defined. As stated in a recent analysis of these discussions: "it is now clear that a finding of *de jure* segregation has basically three prerequisites: (a) school board action (b) with a purpose to segregate (c) which in fact produces segregation in the system". *NOTE, Keyes* v. *School District No. 1: Unlocking the Northern Schoolhouse Doors,* 9 Harv. Civ. Rights-Civ. L. Rev. 124, 149 (1974).

(3)

A comparison of the facts of some of the recent cases with the facts of the instant case indicates that the finding of unconstitutional segregation by the District Court in the present case was based on an erroneous legal standard.

In *Keyes* v. *School District No. 1,* 413 U.S. 189, 198-213 (1973), the Supreme Court discussed the definition of the term *de jure* segregation at length. The *Keyes* case was originally brought to obtain an injunction against the rescission by the Denver School Board of a number of resolutions adopted by a previous School Board designed to desegregate the schools in the Park Hill area in the northeast portion of the city. The District Court found that by, *inter alia,* construction of a new relatively small elementary school, Barrett, in the middle of the Negro Community west of Park Hill, gerrymandering of student attendance zones, the use of so-called "optional zones", and excessive use of mobile classroom units, the School Board had engaged over almost a decade, after 1960, in an unconstitutional policy of deliberate racial segregation with respect to the Park Hill Schools. The District Court therefore ordered the Board to desegregate those schools through the implementation of the three rescinded resolutions, 303 F. Supp. 279, 289 (D. Col. 1969).

The petitioners in the *Keyes* case, then, enlarged their suit and requested that the District Court order desegregation of all segregated schools in the city of Denver, particularly the heavily segregated schools in the core city area. The District Court denied further relief, holding that the deliberate racial segregation of the Park Hill schools did not prove a like segregation policy addressed specifically to the core city schools and requiring petitioners to prove *de jure* segregation for each area that they sought to have desegregated. This part of the ruling was upheld by the Court of Appeals for the Tenth Circuit.

The Supreme Court held that the Courts below did not apply the correct legal standard in dealing with petitioner's contention that respondent School Board had a policy of deliberately segregating the core city schools. 413 U.S. at

198-213. The Supreme Court stated that in a school system "where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." *Id.* at 198. The Supreme Court held that where a policy of intentional segregation has been proven with respect to a significant portion of the school system, the burden shifts to the school authorities to prove that their actions as to other segregated schools in the system were not likewise motivated by a "segregative intent." *Id.* at 207-213.

The Supreme Court in *Keyes* stressed that a finding of *intent* as well as state action is necessary in order to have an unconstitutional school system. The Supreme Court said (*Id.* at 208): "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose or intent to segregate*" (emphasis added).

In the case at bar the court did not find any comparable state action. Judge Dooling noted in his comments during the remedy hearings and in his opinions that the ethnic composition of Franklin K. Lane High School in 1972 was purely the result of demographic changes in the housing patterns of the areas assigned to this high school (75a-76a, 1024-1025). However, he found that the failure to change the zoning of a school district which had existed since 1937 (or 1960), except for the changes noted, *supra* p. 8-10, was unconstitutional state action. We respectfully submit that in a unitary school system which has not been found to have an overall policy of segregation it is incorrect to find inaction (or what a district court may feel is insufficient remedial action) to be unlawful state action on the part of the Board of Education.

Also, the District Court did not find any specific intent to segregate the Lane district as it was designed. The District Court acknowledged that the original district of Franklin K. Lane was, for the most part, composed of white students. No change had been made to increase the minority population of Lane. In fact, the minor changes that were made, probably reduced the number of minority students attending Lane. It is important to note that the Board of Education does not have a negative or even "neutral" approach to the issue of racial school policy. The Board of Education showed, in the evidence adduced at trial, that it has an affirmative policy of integration in the New York City school system. Any implication of "intent to segregate," based primarily on the ethnic composition of Franklin K. Lane High School would be unwarranted and the District court did not so find.

Judge Dooling's determination that "an artificial and unwarranted effect has been produced by treating Lane as a Brooklyn school to be districted primarily in a pattern for Brooklyn schools rather than as part of the complete pattern of all the schools, without reference to borough lines or borough-oriented administrative organization" is incorrect (929). The evidence presented at trial does not show any adherence to the Brooklyn-Queens borough lines in terms of the zoning of the Lane district or the administration of Franklin K. Lane High School (184, 208, 120-211, 261, 312, 573). The "skewered shape" to which Judge Dooling refers in his decision of May 16, 1974, has always existed (266-267, 313, 529-533, 929). It was caused by the fact that Franklin K. Lane was constructed after the other high schools in the area were built and by the fact that the Lane school district had to accommodate the pre-existing contiguous school districts (572-573). Even if Franklin K. Lane was administered and zoned as a Brooklyn High

School, that, in and of itself, would not constitute unconstitutional state action without proof that this policy had the intent and effect of creating a segregated district. No such evidence was introduced at trial.

The Ninth Circuit has construed the *Keyes* decision as requiring for any finding of unconstitutional segregation a "determination that the school authorities had intentionally discriminated against minority students by practicing a deliberate policy of racial segregation". *Soria* v. *Oxnard School District Board of Trustees*, 488 F.2d 579, 585 (9th Cir. 1973). More recently, the Ninth Circuit reversed a finding of *de jure* segregation in which a District Court had treated proof of segregative intent as unnecessary. *Johnson* v. *San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974). There, citing the *Keyes* decision, the court held that the District Court had applied an erroneous legal standard in determining that a constitutional violation had occurred (*Id.* at 358). In the present case, the District Court has apparently used the same standard that was rejected by the Ninth Circuit in light of the *Keyes* decision.

(4)

This Court has found liability when "racial imbalance" in a School district is the result of deliberate, purposeful conduct by a school board, intended to promote segregation. *Taylor* v. *Board of Ed. of City Sch. Dist. of New Rochelle*, 294 F.2d 36, 39 (2d Cir. 1961), *cert. den.* 368 U.S. 940 (1961). In *Taylor*, this Court found that the defendant School Board deliberately created and maintained a school district, the Lincoln School, as an unconstitutionally racially segregated school. The evidence sustained a finding that the Board had, prior to 1949, intentionally created the school as a racially segregated school by gerrymandering district lines and by transfers of white children (see de-

scription of the Board's actions, *Id.* at 38-39). The Board's actions since 1949, amounted to only a perpetuation of the condition, thereby producing an unconstitutionally segregated school. See, to like effect in other Circuits, *Davis* v. *School District of the City of Pontiac, Inc.*, 443 F.2d 573, 576 (6th Cir. 1971); *United States* v. *Board of School Commissioners of Indianapolis, Ind.*, 474 F.2d 81, 84 (7th Cir. 1973), *cert. den.* 413 U.S. 920 (1973).

In the present case, the District Court did not find that the New York City Board of Education had originally created the Lane district as a segregated school, nor did it find that the Board in any way changed the district lines in order to create and maintain racial imbalance. The district lines of Lane are essentially the same as they were when Lane had an ethnic composition of over 80% "white" population. The areas with "white" students were never removed from the Lane district. As this once primarily white district became composed more and more of minority families, some of the primarily minority population areas were removed from the Lane district. The facts in the instant case, then, are the converse of the situation described by this Court in *Taylor*.

In the more recent case of *Offerman* v. *Nitkowski*, 378 F.2d 22 (2d Cir. 1967), this Court held that communities have no constitutional duty to undo bona fide *de facto* segregation. See also *Norwalk Core* v. *Norwalk Board of Education*, 298 F. Supp. 213 (D. Conn. 1969), affd. 423 F.2d 121 (2d Cir. 1970). See, in other jurisdictions, *Deal* v. *Cincinnati Bd. of Ed.*, 369 F.2d 55 (6th Cir. 1966), *cert. den.* 389 U.S. 847 (1967); *Downs* v. *Board of Education*, 336 F.2d 988 (10th Cir. 1964), *cert. den.* 380 U.S. 914 (1965); *Springfield School Comm.* v. *Barksdale*, 348 F.2d 261, 266 (1st Cir. 1965); *Bell* v. *School City of Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. den.* 377 U.S. 924 (1964). *Cf. Lawlor*

v. *Board of Education of the City of Chicago*, 458 F.2d 660, 662 (7th Cir. 1972), *cert. den.* 413 U.S. 921 (1973); *Morales* v. *Shannon*, 366 F. Supp. 813 (W.D. Tex. 1973); *Zamora* v. *New Braunfels Independent School District*, 362 F. Supp. 552 (W.D. Tex. 1973).

In *Offerman*, this Court, citing *Taylor* v. *Board of Education, supra*, described the distinction between proscribed *de jure* and permitted *de facto* segregation as depending upon whether "race was made the basis for school districting, with the purpose and effect of producing a substantially segregated school". 378 F.2d at 24, citing *Taylor* v. *Board of Education*, 294 F.2d 36, at 39 (2d Cir. 1961), *cert. den.* 368 U.S. 940 (1961).* On the basis of the definition espoused in *Taylor* and confirmed in *Offerman* it is clear that at most Franklin K. Lane is a "*de facto* segregated school." Accordingly, the District Court erred in finding liability on the part of the Board of Education.

(5)

Milliken v. *Bradley*, 94 S.Ct. 3112 (1974), recently decided by the Supreme Court, is not directly on point, since it concerned the propriety of imposing a multidistrict remedy for single-district *de jure* segregation in the absence of findings that the other districts affected by the

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* Some District Court decisions in New York support the view that School Boards have a duty to change school districting when the racial composition of a school changes because the residential pattern changed over a long period. See *Blocker* v. *Bd. of Ed. of Manhasset, New York*, 226 F. Supp. 208, 229 (E.D.N.Y. 1964) (ZAVATT, J.); *Branche* v. *Bd. of Ed. of the Town of Hempstead*, 204 F. Supp. 150, 153 (E.D.N.Y. 1962) (DOOLING, J.). This Court specifically ruled that *Blocker* is not the law of this Circuit in *Offerman* v. *Nitkowski*, 378 F.2d 214 (2d Cir. 1967). The *Branche* decision was questioned in *Webb* v. *Board of Education of the City of Chicago*, 223 F. Supp. 466, 468 (N.D. Ill. 1963), and is inconsistent with both *Offerman* and *Taylor*, as well as our reading of *Keyes*.

proposed remedy themselves had unlawfully discriminatory systems. However, it is interesting to note that the basis there for the finding on liability in the District Court, sustained by the Supreme Court, was that the segregated District school system was a result of governmental action. *Bradley* v. *Milliken,* 338 F. Supp. 27, 582, 587 (E.D. Mich. 1971), cited in *Milliken* v. *Bradley,* 94 S.Ct. 3112, at 3117 (1974). There the District Court found that the Detroit Board of Education had created and maintained optional attendance zones within Detroit neighborhoods undergoing racial transition and between high dominant racial compositions. These zones, the court found, had the "natural, probable, foreseeable and actual effect" of allowing white pupils to escape identifiably Negro schools. 338 F. Supp., at 587. Similarly, the District Court found that Detroit school attendance zones had been drawn along north-south boundary lines despite the Detroit Board's awareness that drawing boundary lines in an east-west direction would result in significantly greater desegregation. The District Court concluded that the natural (and actual) consequence of these acts was the creation and perpetuation of school segregation within Detroit.

The District Court also there found that in the operation of its school transportation program, which was designed to relieve overcrowding, the Detroit Board had admittedly bused Negro Detroit pupils to predominately Negro schools which were beyond or away from closer white schools with available space. This practice was found to have continued in recent years, despite the Detroit Board's avowed policy, adopted in 1967, of utilizing transportation to increase desegregation.

With respect to the Detroit Board of Education's practices in school construction, the District Court found that

Detroit school construction generally tended to have segregative effect, with the great majority of schools being built in either overwhelmingly all Negro or all white neighborhoods, so that the new schools opened as predominantly one race schools. Thus, of the 14 schools which opened for use in 1970-1971, 11 opened with over 90% Negro population and one opened with less than 10% Negro population.

The District Court, in the case at bar, did not make any similar findings. Rather, Judge Dooling based his finding of liability solely on adherence to zoning of a school district which was never shown to have been created or maintained in order to implement school segregation.

CONCLUSION

It is respectfully submitted that applying the test of *de jure* segregation stated in *Keyes* v. *School District No. 1*, 413 U.S. 189, 198 (1973) to the undisputed facts of the present case, Judge Dooling's finding that Franklin K. Lane High School has been unconstitutionally segregated must be rejected. The standard for determining unlawful racial discrimination here applied by the District Court is squarely at variance with the *Keyes* standard. For this reason the order of the District Court should be reversed and the complaint should be dismissed with costs.

December 11, 1974.

Respectfully submitted,

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County and State of New York, ss :

JAMES BURNS

duly sworn, says, that on the 11th day of Dec. — 1974

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annexed APPELLANT'S - BRIEF upon MORTIMER - TOBEL Esq.

torney for the APPELLANTS in the within entitled action by delivering

copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

the same with him.

Sworn to before me, this 11th day of December, 1974

James Burns

John Calia

JOHN CALIA
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